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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

WILLIAM W. WINPISINGER, *et al.*,
Petitioners,

v.

JACK WATSON, *et al.*,
Respondents.

MOTION FOR SUMMARY DISPOSITION ON THE ACCOMPANYING PETITION FOR CERTIORARI OR IN THE ALTERNATIVE FOR EXPEDITED PROCEEDINGS

AND

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners move this Court for immediate summary disposition of the accompanying petition for certiorari by reversal of the judgment below, or in the alternative for expedited proceedings. Such extraordinary expedition is warranted by the importance of the question presented and the fact that, should this case proceed in the normal course, it will be moot before the beginning of October Term 1980.

This case involves petitioners' First and Fifth Amendment rights in the 1980 Presidential election process. The loss of First Amendment rights "for even minimal periods of time" warrants expedition. *Cf. Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Petitioners are supporters of Senator Edward M. Kennedy for the 1980 Democratic presidential nomination and active participants in

his campaign. Petitioners allege that respondents, 14 high federal officials and the Carter-Mondale Presidential Committee, are using federal funds and federal power in their control to secure the 1980 Democratic presidential nomination for Jimmy Carter.[1] Respondents are thereby purchasing support for Jimmy Carter in state primaries and caucuses where delegates to the August Democratic National Convention are chosen, and at the Convention itself.

Petitioners seek an injunction against continuance of this conduct. The complaint was filed on December 28, 1979, and the case has been treated on an expedited basis by the district court and the court of appeals, because of the urgency of this matter.

The lower courts dismissed the complaint. Should this Court determine that they were in error, that decision must come soon in order to prevent further injury to petitioners' First Amendment rights to compete in the political process without government power weighed in the balance on the other side. At the filing of this motion and petition for certiorari, 1784 delegates to the August 1980 Democratic National Convention, more than half of the total of 3,331, remain to be chosen in primary and caucus elections.[2]

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[1] See accompanying Petition for Certiorari.

[2] State	Date	No. of Delegates	Primary (P) or Caucus (C)
Missouri	April 22	77	C
Pennsylvania	April 22	185	P
Michigan	April 26	141	C
Guam	May 3	4	C
Texas	May 3	152	C
Colorado	May 5	40	C
Indiana	May 6	80	P
North Carolina	May 6	69	P
Tennessee	May 6	55	P

[Footnote continued on page 3]

In each such election that passes in which respondents are allowed to use the federal purse to purchase support for Jimmy Carter, respondents irretrievably harm petitioners' First and Fifth Amendment rights: to a vote undiluted by such government action, to associate to support a candidate with effectiveness unimpaired and unimpeded by governmental action and to an equal chance in the election process without being swamped by government funds on the other side. If respondents continue through the August convention to finance the Carter campaign effort out of the treasury, to use the threat of loss of federal employment to coerce support and to use federal grants, loans and contracts to buy the support of political leaders, this petition, and petitioners' rights,

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[2] [Continued]

State	Date	No. of Delegates	Primary (P) or Caucus (C)
District of Columbia	May 6	19	P
Maryland	May 13	59	P
Nebraska	May 13	24	P
Utah	May 19	20	C
Oregon	May 20	39	P
Arkansas	May 27	33	P
Kentucky	May 27	50	P
Nevada	May 27	12	P
Idaho	May 27	17	P
California	June 3	306	P
Montana	June 3	19	P
New Jersey	June 3	113	P
New Mexico	June 3	20	P
Ohio	June 3	161	P
Rhode Island	June 3	23	P
South Dakota	June 3	19	P
West Virginia	June 3	35	P
Latin Americans	June 7	4	C
Virgin Islands	June 7	4	C
Democrats Abroad	June 7	4	C
		1,784	

will be moot. Immediate action by this Court is imperative.

Accordingly petitioners pray that the Court order respondents to respond to the Petition for Certiorari within five days and dispose of the petition summarily—by reversing the lower court.[3] In the alternative, petitioners pray that the petition be granted forthwith and an expedited schedule for briefing and oral argument be established.

Respectfully submitted,

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[3] This motion and the accompanying petition were served by hand on April 17, 1980.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William W. Winpisinger, et al., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit of April 10, 1980, is reproduced as Appendix A. The opinion of the United States District Court for the District of Columbia of February 7, 1980, is reproduced as Appendix B. Proceedings in both courts were expedited. Neither opinion has yet been reported.

JURISDICTION

The judgment of the Court of Appeals, affirming the District Court's dismissal of petitioners' complaint, was entered on April 10, 1980. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where federal officials are intentionally using federal funds and federal power to induce and coerce Democratic party voters and political leaders and federal government employees to support the candidacy of Jimmy Carter for the Democratic Presidential nomination, do supporters and participants in the campaign of Edward Kennedy, suffer concrete injury to personal political rights guaranteed by the First Amendment and Fifth Amendments regardless of the *outcome* of the nomination contest and do they thus have standing to bring this action?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Fourteenth Amendment:

> . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The issue in this case is whether the courts will afford relief to plaintiffs (petitioners here) whose voting, speaking and associational efforts to lawfully unseat an incumbent President in the 1980 renomination and election process—efforts protected by the First Amendment and the guarantee of equal protection incorporated in the Fifth Amendment—are being damaged and diluted by that incumbent President's highest appointees' cynical, deliberate and widely announced abuse of federal treasury money and federal government power. The court below said no. It argued that because judicial relief cannot guarantee that petitioners' candidate would indeed win the renomination battle, petitioners had no standing to sue; and it argued that in any event, no matter how egregiously unconstitutional were the actions of respondent government officials, the court would not grant a remedy that would interfere with them because they were employees of the Executive, a coordinate branch of government. It is no exaggeration that, if allowed to stand, the lower court's ruling may spell an end to the constitutional rights of the people of this nation freely to choose a President every four years. The lower court's ruling, unreviewed and unreversed, will assure to the incumbency for all time that they may raid the federal treasury to buy, and marshal brigades of federal officials to support, their own renomination and reelection, without fear that the courts—the only branch of government free of politics—will call a halt. No question of such importance to maintenance of our constitutional form of government has been presented to this Court since *United States* v. *Nixon*, 418 U.S. 683 (1974).

Facts *

Petitioners, registered Democrats and voters in the states of Maryland, Hawaii, Georgia, Iowa and New Hampshire and the District of Columbia, actively support and intend to vote for Senator Edward Kennedy as the 1980 Democratic presidential nominee, in opposition to the incumbent, President Jimmy Carter. Four are also financial contributors to the Kennedy campaign and two are candidates for delegate to the 1980 Democratic National Convention.[1]

Respondents are seven principal Carter White House officials, all with major political responsibilities in the nomination contest; seven cabinet secretaries with control of billions of dollars in so-called "discretionary" federal grant, loan and otherwise dispensable funds, and Jimmy Carter's principal campaign committee. Respondents are actively engaged in promoting the renomination of Jimmy Carter.

Respondents began their massive raid on the federal treasury and abuse of their office to sew up the nomination for Carter with the Democratic party "straw" balloting in Florida last year. Under respondents' direction, many of them and other federal officials swarmed into Florida to campaign for Jimmy Carter. Their travel expenses were paid in whole or in part out of the federal treasury. They continued to get their full government salaries while campaigning. The Carter campaign committee (also a respondent) arranged the trips. At the

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* These fact allegations, summarized from the pleadings, are taken as true for purposes of this petition. Warth v. Seldin, 422 U.S. 490, 501 (1975). Where not in the pleadings, appropriate references are made.

[1] It is petitioners as voters, contributors, participants and supporters of the candidate whose rights are constitutionally protected rather than the candidate's rights. Bullock v. Carter, 405 U.S. 134 (1972).

same time respondents flooded Florida with federal grant and loan money, in an amount many multiples of that awarded in Florida in any other similar period in its history. The grants included a $1 *billion* loan guarantee that was processed, from start to finish, in ten weeks—no doubt a federal record.

As the Florida balloting was taking place on October 13, 1979, respondent Hamilton Jordan, the White House Chief of Staff and the leader of respondents in this effort to perpetuate Jimmy Carter and themselves in power, announced that any federal official who could lawfully campaign at all had better campaign for Jimmy Carter—anyone who campaigned for Senator Kennedy would be fired. To make the message still clearer the White House deputy press secretary repeated it the next day, and three weeks later the cabinet was told to enforce the message that all non-"Hatched" federal employees were expected to campaign for Carter or be fired. In September, setting aside the intent of Congress to take the census out of politics, respondents decided to award the 275,000 federal jobs of the 1980 Census exclusively on the basis of support for Carter's renomination. Right under the nose of the courts in the Nation's Capitol, census jobs were held hostage until Mayor Barry formally and loudly endorsed Jimmy Carter.

Begun in Florida, respondents have proliferated their dispensing of federal discretionary funds to buy, or coerce, the support of influential elected Democrats (and hence their followers and their followers' votes) for Carter. A tale of two cities, Detroit and Chicago, is demonstrative.

Mayor Coleman Young of Detroit is a prominent Democrat and political leader. Respondents were eager for his support and active campaign assistance. But one of the federal government's main discretionary urban pro-

grams, CETA,[2] was due to expire on October 1, 1979, cutting off the pay of 1,600 Detroit city employees. Young told respondents that he could not join the campaign trail with such a cutoff facing him. Without further ado respondents promised Mayor Young that Detroit's 1,600 jobs would be re-funded; on September 24, 1979, they were re-funded, and in October Mayor Young campaigned for Carter in Florida. Mayor Young's continued support continues to be amply rewarded. Between September and November Detroit received additional awards of discretionary federal funds totalling $22 million and the promise of $600 million more; and at a Carter campaign fundraising luncheon Jimmy Carter's "surrogate" and running mate, Vice President Mondale, made sure no one missed the point, by emphasizing how much funding the Carter administration had given Detroit since 1977.

If Detroit shows the carrot, respondents' treatment of Chicago shows the stick. Jimmy Carter went to a political fundraising dinner in Chicago on October 15 and boasted how he had favored the city with discretionary funds of the Departments of Housing and Urban Development and Transportation in the hundreds of millions; he announced airport aid and other largesse. But a few days later Chicago's Mayor Jane Byrne endorsed Senator Kennedy. All of a sudden, no more was heard of airport aid. Respondent Secretary of Transportation Goldschmidt, after checking with White House aide respondent Jack Watson, announced that no more of his Department's discretionary funds would be going to Chicago; and said he had no intention of even speaking to Mayor Byrne about already agreed mass transit assistance.

These instances are hardly isolated. Philadelphia's Mayor-elect was warned by the ubiquitous Goldschmidt that a DOT grant depended on whether Mayor-elect

[2] The Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 et seq. (1978).

Green supported the Carter candidacy. New York's Mayor's support for Carter was rewarded by awards of some $300 million from September through November. Carter's New York political campaign coordinator arranged emergency aid for the New York City schools. Congressman Rangel of New York candidly announced that he was supporting Carter because of a $30 million federal project plunked into his district.

In East St. Louis, Illinois, respondent Watson arrived in the city, announced three different federal awards and received East St. Louis' Mayor's endorsement of the Carter candidacy—all on the same day.

Respondent Goldschmidt and respondent Landrieu, Secretary of Housing and Urban Development, trumpeted to the annual meeting of the nation's Mayors in late November that support for Carter would be amply rewarded. And at the same affair respondent Watson pointedly told a Kennedy-supporter Mayor—at a press conference, so the message was not missed—that discretionary funds would flow to Carter supporters.

Respondents have trained campaign "advance" personnel at government expense. They have prepared, printed and distributed campaign literature at government expense.[3] They have put Representative Barbara Mikulski,

[3] *See*, in addition to material in pleadings, Clark, "Carter Plays Santa Claus for His Reelection Campaign," *National Journal*, April 5, 1980, p. 548:

> "A President must be judged on his record. Not on promises, not on personality. But, rather, on clear, recognized accomplishments.
>
> That is a judgment President Carter is eager for the American people to make. For his record is one of nearly unparalleled achievement.
>
> Not since the beginning of the New Deal has any President compiled, in just 33 months, so comprehensive and enduring a record in both domestic and foreign policy. . . ."

[Footnote continued on page 8]

a Kennedy supporter in Maryland, on an "enemies list." They denied the little city of Carbondale, Illinois, a federal grant because its Congressman, Representative Paul Simon (D. Ill.), supports Senator Kennedy.

In November respondents made grants to Marcus (pop. 1,162) and Marengo (pop. 2,174), two communities in Iowa, the state where Jimmy Carter's successful 1976 campaign gained its first victory and where the 1980 convention delegate selection process began. The grants totalled $881,000. One hundred twenty-three Marcus and Marengo Democrats voted for Carter in the January 21, 1980, Iowa caucuses. Each Carter vote cost over $7,000 in federal treasury funds.

Neither the filing of this action on December 28, 1979, nor the spotlight of press attention on their abuses deterred respondents. "A dozen" White House staff members—on the federal payroll—trooped up to campaign in the February Maine caucuses, while $21 million in federal aid to Maine's poor "were pouring" into the State.[4]

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[3] [Continued]

These are the opening paragraphs of a 57-page book entitled *The Record of President Jimmy Carter*, written by Carter's Domestic Policy Staff and printed by the Defense Department last October. The White House staff distributed hundreds of copies to people they hoped would be Carter's friends in 1980.

Then White House lawyers intervened. Finding that the book had a distinctly political ring, they advised that printing and distributing it at government expense might violate laws barring the use of government funds for political purposes. So the booklet was withdrawn from circulation, adulatory language was excised and a new edition was printed with a new title, *The Record of President Carter's Administration.* The White House is now distributing the revised version.

All the versions of this campaign pamphlet are in the record of this case.

[4] *Wall Street Journal* (WSJ), February 8, 1980, p. 1, col. 5; *New York Times* (NYT), February 6, 1980, p. A20, col. 1. The lower court took judicial notice of such post-complaint facts, Fed. R. Evid. 201(b), (f). App. A *infra* 11a n. 28.

Federal grants to Maine in January 1980 were double those in January 1979, while in New Hampshire, site of the first of the nation's primaries in February, grants quadrupled from December 1979 to January 1980.[5] The Governor of Rhode Island endorsed Carter explicitly because of the "funneling" of federal funds to the State.[6] Respondent Weddington continued to send out seven thousand free copies of "White House News on Women," a slick magazine featuring Carter pictures, Carter quotes and a two-page department styled "Carter Initiatives."[7]

Only five days before the New York primary, New York City's Mayor Koch was promised exemption from the Carter proposals to cut grants to cities as part of the effort to balance the budget—to the tune of $80 to $100 million. The promise kept Mayor Koch from holding a press conference in which he planned to denounce the Carter cuts. The matter was so blatant that the Mayor felt the need to protest publicly that "the White House had not tried to 'buy my silence' with the new aid packages."[8]

Someone, however, did "buy" the endorsement of Carter by the New York Post, New York City's only afternoon newspaper, before the New York primary. Rupert Murdoch, publisher of the Post, also owns a major airline in Australia. On the morning of February 19, Murdoch asked the federal Export-Import Bank's chair-

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[5] *National Journal*, April 5, 1980, p. 549.

[6] *NYT*, January 18, 1980, p. A14, col. 1.

[7] *See* "White House News on Women," vol. II, issue I, January 1980 at 2; vol. II, issue II, February 1980 at 1, 2; *National Journal*, April 5, 1980, p. 553.

[8] *NYT*, March 20, 1980, p. 1, col. 1. Circuit Judge MacKinnon referred to this episode at oral argument and, as noted n. 4 *supra*, the lower court took judicial notice of it.

man John Moore, a Georgia "associate" of Jimmy Carter (as are respondents Jordan, Powell and Watson), to approve a loan of several hundred million dollars to his airline to buy Boeing aircraft. Murdoch insisted that the loan be at 8% interest and be approved in 10 days. As he left the Bank, Murdoch mentioned that he was going to the White House for lunch. The lunch had been arranged by Carter's New York campaign chief (the same man who arranged the emergency school loan to New York City) to help Murdoch decide whether the Post should endorse Carter in the New York primary. At lunch Murdoch told Carter he would endorse him for renomination.

The Post endorsed Carter on February 22. Six days later, despite staff objections that the loan would be competitive at 9%, despite one Eximbank director's noting that every ¼% of interest concession was equal to a $6.6 million cash subsidy to Murdoch, despite the initial objections of the Treasury Department and the Federal Reserve, Moore, in touch with U.S. Ambassador to Australia Philip Alston—another Georgia friend—lobbied, cajoled and successfully pushed through a $290 million loan package—of U.S. government funds—for Murdoch at the figure Murdoch demanded.[9]

Proceedings Below

Petitioners filed their complaint on December 28, 1979. It recited the facts in great detail, supported by voluminous documentary evidence—for it is in the nature of respondents' scheme and conduct that it be publicized in

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[9] *NYT*, March 18, 1980, p. D1, col. 1; *Washington Post*, March 19, 1980, p. E-1, col. 1; *Washington Star*, April 5, 1980, April 6, 1980, April 9, 1980; transcripts of Eximbank Board meetings, February 26, 28, 1980; other documents from Eximbank, Treasury, Federal Reserve.

order to be effective. The complaint alleged infringement of petitioners' First Amendment rights to vote, to associate in support of a candidate, to make financial contributions to support a candidate and to run for election as convention delegates, and of their Equal Protection rights to do so without suffering government-imposed inequality.

The district court, heeding petitioners' plea of urgency, expedited the proceedings, but on February 7, 1980, granted respondents' motion to dismiss the complaint for lack of standing (Appendix B). The district court held that petitioners had failed to allege concrete injury to themselves (App. B 20a) as well as the necessary causal connection between their injury and respondents' acts (App. B 21a)—characterizing petitioners' allegations of injury as the failure of Senator Kennedy to win votes (App. B 20a). Petitioners immediately appealed and the court of appeals, again on petitioners' motion, expedited briefing, argument and decision of the appeal.

The court of appeals rejected petitioners' standing on the causality ground alone. It did not affirm (and apparently rejected *sub silentio*) the district court's holding that petitioners had failed to show concrete injury at all (*See* App. A 8a, 11a). But the court of appeals grossly misconceived the nature of the injury to petitioners and its links to respondents' conduct. Without analysis and entirely ignoring the constitutional rights involved, the court of appeals characterized petitioners' injury as lying in "the *outcome* of state presidential primary elections, caucuses and conventions" (App. A. 11a-12a; emphasis added). It then found the "causal link" between respondents' unconstitutional abuses and the election "outcome" too "tenuous" to support standing, because of so many "factors potentially contributing" to that "outcome."

But neither in the complaint nor at any point in the district court and appellate court proceedings did petitioners claim a right to a particular "outcome" of the nomination process or any part of it. They claimed only the right—a right long recognized by this Court—to a fair and equal opportunity to compete in the election process without government power interfering to favor one voter, one candidate, one geographical area, one race, one anything—over another.[10] In distorting the case to support dismissal, the court of appeals failed altogether to address what petitioners did, and do, demonstrate as their injury—injury to their right to make their political arguments to an audience whose ears have not been plugged by federal gold and federal power.

Having rejected standing by miscasting the gravamen of the case, the court of appeals went on to invent a new ground for refusing to entertain a claim of infringement of personal constitutional rights. The court of appeals characterized this case as involving "virtually every discretionary decision made by the Administration acting through these high [respondent] government officials." It shrank from what it described as interjecting itself "into practically every facet of the Executive Branch" to appraise "whether considerations other than pure public service," i.e., "political expediency," "motivated a particular [respondent] in the performance of . . . official duties." Citing not a single decision of this Court, the court of appeals declared that "[p]rudential barriers upon courts clearly preclude judicial interference in the daily

[10] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Baker v. Carr, 369 U.S. 186 (1962); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Williams v. Rhodes, 393 U.S. 23 (1968); Bullock v. Carter, 405 U.S. 134 (1972).

responsibilities" of respondent officials.[11] (App. A 13a-14a)

The court of appeals recognized that this Court and the Seventh Circuit had approved just such "interference" with just such abuses of incumbency in *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, —— U.S. —— (1980), and *Shakman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *on remand*, 481 F. Supp. 1315 (N.D. Ill. 1979). These decisions condemn "patronage"[12] as tipping "the electoral process in favor of the incumbent party," *Elrod*, 427 U.S. at 356, condemn the incumbent's patronage "power to starve political opposition by commanding partisan support," *Branti*, —— U.S. at —— n. 8, and condemn "the misuse of official power . . . to create a . . . political effort in favor of the ins and against the outs," *Shakman*, 435 F.2d at 270.

This Court obviously requires—and permits—court scrutiny of "discretionary" decisions regarding public employment—one of the principal "patronage" abuses challenged in this case.[13] The court of appeals sloughed

[11] The egregious fallacy of this approach is demonstrated by changing the word "political" to "racial." There is no question but that a court would examine, and police, every "discretionary decision," every "facet of the Executive branch," every action of any federal official in carrying out "daily responsibilities" were it alleged that respondents were employing threats of loss of federal employment, threats of denial of federal grants or the expenditure of federal funds to discriminate against blacks. *See, e.g.*, United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947), equating "Republican, Jew or Negro" as categories which cannot constitutionally be used as tests for federal employment; Branti v. Finkel, —— U.S. at —— n. 10 (1980).

[12] Defined to include public employment and other public benefits like government contracts and public services—in essence what is at stake here. *Cf. Elrod*, 427 U.S. at 353.

[13] See, for example, the order on remand in *Elrod*, No. 71 C 607 (N.D. Ill. April 14, 1977), simply enjoining the Cook County Sheriff and the Democratic Party organization from "discharging or recom-

those cases aside by saying that they involved local government actions and that here the separation of powers doctrine prevents the district court from entertaining a suit alleging similar constitutional violations by federal officials (App. A 15a-16a). We submit that this is upside-down reasoning—the danger to our democratic society from federal government actions to reelect a President is many times greater than in those cases and thus far more in need of judicial intervention.

REASONS FOR GRANTING WRIT

1. This Court has repeatedly recognized that the abuse of power by public officials for their perpetuation in office gravely endangers our democratic form of government. A century ago, *Ex parte Curtis*, 106 U.S. 371, 375 (1882) censured conduct by which "the Government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." More recently, in *Elrod* v. *Burns*, 427 U.S. at 369-70, a plurality of this Court condemned patronage pressure for elections support as "a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government," and emphasized (at 356) that thereby not only are association rights denied but "the free functioning of the electoral process also suffers." And only less than three weeks ago, this Court warned again in *Branti* v. *Finkel*, —— U.S. —— at ——, n. 12, that

> "Government funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party

mending for discharge" public employees based on, *inter alia*, "the employee's present or future . . . political support of . . . any candidate"; and requiring the posting of a notice to that effect.

> simply because that party has control of the government. The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose."

The ruling below that voters and campaign participants nevertheless have no judicial remedy against perversion of the public treasury by incumbent federal officials for the renomination of the President, leaves basic political rights without a remedy and leaves defenseless the fair election process which secures and validates our democratic system of self-government. Criminal proceedings which must be instituted by other Presidential appointees are, of course, unavailable as a matter of practical fact against conduct by high government officials seeking to secure the appointing President's reelection. Civil enforcement of the fundamental right to a fair election is now obliterated by the ruling below, although it was earlier strongly vindicated by the Seventh Circuit's *Shakman* opinion. Only this Court can now preserve the integrity of federal elections from plainly illegal official conduct.

2. The court below holds that to sustain standing to sue to prevent the purchase of a federal election by misuse of federal power and public funds, petitioners must show that their preferred candidate would win nomination *but for* defendants' illegal conduct. That would be a relevant consideration if plaintiffs were claiming a constitutional right to have their candidate *win* the election. But the right here at stake is nothing so extravagant—it is simply the right of voters and campaign participants to a fair election process unadulterated by partisan use of public power and public funds by incumbent officials. It is no more an answer to these plaintiffs that if the nomination process were fair rather than foul their candidate might still not prevail, than

in any of this Court's cases involving ballot access, ballot stuffing, malapportionment, and minor party rights of participation, all of which met the standing requirements laid down in *Baker* and *Reynolds*.

This is the first time that a federal court has imposed a guaranteed success test on standing to sue to stop government abridgment of voting and associational rights or on standing to sue to obtain equal access to the election process. The lower court's decision is tantamount to holding that voters in malapportioned districts must show that reapportionment would give them control of the legislature; or that black voters denied the vote in the white primary cases had to show that their votes would nominate a pro-Black; or that holders of unpopular views excluded from using the public parks to speak must show that people would come to hear them and would be persuaded, or that voters for an impecunious candidate must show that their candidate would win in order to strike down an unconstitutional filing fee requirement.

3. Nor is the Court below supported in its conclusion that it is "prudent" to withhold constitutional remedies which are necessary to preserve our democratic system of elections. While it is never a happy occasion when high government officials are enjoined from illegalities, necessity compels that course on numerous occasions as the only means to safeguard the "law of the land." Under the seminal principle of *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), "prudence" did not forestall an injunction against President Truman's steel seizure or against President Nixon's impoundment actions.[14]

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[14] In *United States* v. *Nixon*, 418 U.S. 683, 692 (1974), this Court emphatically denied the contention that the judiciary should not review the President's claims of secrecy because such review would "intrude into areas committed to the other branches of government."

[Footnote continued on page 17]

The lower court's timidity—which it calls "prudence" —about inquiring into the "political motivation" (App. A 14a, n.30) of respondents' actions[15] ignores the myriad decisions holding precisely that courts must and should inquire into political motive for executive and administrative determinations where politics is forbidden to intrude.[16] The lower court's invocation of "prudential barriers" goes far beyond anything which this Court has so labeled in the standing context. "Prudential" standing barriers require only that a plaintiff have alleged injury peculiar to himself, not just a generalized grievance; his own legal interests, not those of third parties and interests within a statutory "zone of interests." *Gladstone, Real-*

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[14] [Continued]

In *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), this Court rejected the " 'archaic view of the separation of powers as requiring three airtight departments of government.' "

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court denied the President the right to remove commissioners of independent regulatory agencies.

In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the Court invalidated the Executive's seizure of steel mills, notwithstanding the President's claim of inherent authority to take such action.

In *Train* v. *City of New York*, 420 U.S. 35 (1975), the Court held that Executive impoundment of congressionally appropriated money was impermissible, despite the fact that the Court's decision interfered with Executive Branch autonomy.

[15] Hardly a difficult task when respondents themselves—in order to make their plan effective—announce their "political motivation"; *see* pp. 5-8, *supra*.

[16] *E.g.*, D.C. Federation of Civic Assoc. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978); Knoetze v. United States, 472 F. Supp. 201 (S.D. Fla. 1979); Texas Medical Ass'n v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976); Koniag, Inc. v. Kleppe, 405 F. Supp. 1360 (D.D.C. 1975), *modified*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978); Center on Corporate Responsibility, Inc. v. Shultz, 368 F. Supp. 863 (D.D.C. 1973).

tors v. *Village of Bellwood*, 441 U.S. 91, 99-100 (majority opinion), 120 (dissenting opinion) (1979).

The lower court's "prudential" reasoning would immunize the federal government from the reach of the recent decisions of this Court that condemned just such unlawful practices as are at issue here, precisely because "[i]t is not only belief and association which are restricted," but "[t]he free functioning of the electoral process also suffers." *Elrod* v. *Burns*, 427 U.S. at 356. If anything, these holdings should apply with greater force to the federal executive than to local governments, because of its overwhelmingly greater power over our national life and because of the enormous resources available as patronage to an incumbent President's appointed staff. As Mr. Justice (then Circuit Judge) Stevens wrote in a patronage case even before *Elrod*:

> "as the number of employees affected is increased, the importance of preserving their First Amendment freedoms likewise grows. Indeed, when numbers are considered, *it is appropriate* not merely *to consider* the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also *the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits.* While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."

Illinois State Employees Union v. *Lewis*, 473 F.2d 561, 576 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1973) (emphasis added).

4. The lower court's "prudential" fear of conflict with the Executive Branch if it were to enjoin respondents' unconstitutional treasury raid transmutes deference into abdication. Quite likely this resulted from the lower court's suggestion (App. A, 15a, n. 31) that this case involves a "political question" on which the courts should eschew correction of Executive malfeasance. But just such an argument was disposed of by Mr. Justice (then Circuit Judge) Stevens, in *Illinois State Employees Union*, 473 F.2d at 567:

> "It is well settled that our duty to accord appropriate respect to a state's sovereignty does not require us to accord finality to a decision to dismiss an employee for an impermissible reason, or to a policy of discrimination against members of a particular race, religion, or political faith in the award or withholding of public benefits. Nor is there any lack of judicially manageable standards in cases of this kind. The motivation for the dismissal of state employees was the critical issue in a wide range of cases which the Supreme Court has routinely treated as justiciable. The underlying rationale for the "political question" doctrine plainly has no application to this case.
>
> Of course the word "political" may be applied to several facets of this dispute. The plaintiffs may have acquired their jobs for "political" reasons; they seek to vindicate a "political" right; the outcome of the litigation will have "political" consequences; and, perhaps of greatest significance, defendant's alleged employment practices are supported by ancient and respected "political" tradition. But, as Mr. Justice Holmes so aptly stated, an "objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, ..."

5. Finally, the lower court's decision denying a judicial remedy to voters and supporters of a candidate to challenge the injuries inflicted on their First and Fifth Amendment rights squarely conflicts with *Shakman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *on remand*, 481 F. Supp. 1315 (N.D. Ill. 1979). There the Seventh Circuit granted standing, to voters supporting a particular candidate, to challenge a patronage system—the use by incumbents of government funds and power to perpetuate themselves in office, because "plaintiffs are seeking redress for injuries to their own interests and the interests of others similarly situated." 435 F.2d at 269. This is the law in the Seventh Circuit today. *Shakman* (on remand), 481 F. Supp. at 1326 n. 6, 1328.

The Seventh Circuit had no difficulty in distinguishing voters-supporters' interest in a fair opportunity to compete from any guaranteed "outcome" :

> "The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure."

435 F.2d at 270; and *see Shakman* (on remand), 481 F. Supp. at 1335 (emphasis added): "The state is alleged to work against and make more difficult the election of certain candidates. To the extent that this is true, . . . *the value of the votes of those supporting those candidates*, in terms of their ability to affect the outcome of an election *is lessened*."

The continued vitality of *Shakman* appears from *Illinois State Employees Union*, 473 F.2d at 569 n. 17:

"The holding of *Shakman* is, however, in complete accord with our decision here," and from *Elrod*, where, in dissenting and stating that the Court was "exaggerat-[ing] the perceived burden on First Amendment rights" of the employees who were plaintiffs there, Mr. Justice Powell characterized *Shakman* as a case involving allegations "that patronage practices exclude[d] . . . voters . . . from effective participation in the political process by impermissibly disadvantaging them." 427 U.S. at 382 n. 5.

CONCLUSION

> "Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority, is therefore, an essential attribute of the election system in a democratic republic. Consequently, both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on their power. Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership."

L. Tribe, American Constitutional Law, § 13-18 (1978).

When it comes to an effort to buy high public office with the public treasury, the prudence which must prevail is not judicial deference to Executive illegality, but the prudence enshrined in such rulings as *Marbury*, *Baker* and *Reynolds*, which recognize that this Court is our last but necessary resort to protect the law of the land. The functioning and integrity of our democratic system of self-government make it more than prudent that courts hold public officials accountable for and within the rules established by the Constitution for our self-governance. When high trusted officials misbehave for

personal advantage, that is not the time for judicial abstention but the *most important occasion of all* for assuring that we remain a nation governed by our fundamental law.

The need for this Court's review is urgent. The decision below leaves our constitutional scheme defenseless against illegal use of public power and public funds to procure renomination of the incumbent faction's candidate for the highest office in this democratic land of ours.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1160

WILLIAM W. WINPISINGER, *et al.*,
Appellants

v.

JACK WATSON, Secretary of the Cabinet & Assistant to the President for Intergovernmental Affairs, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 79-3471)

Argued March 21, 1980

Decided April 10, 1980

Joseph L. Rauh, Jr., with whom *John Silard, William A. Dobrovir* and *Erwin Chemerinsky* were on the brief, for appellants.

Paul Blankenstein, Attorney, Department of Justice with whom *Alice Daniel*, Assistant Attorney General, *Charles F. C. Ruff*, United Statets Attorney, *Robert E. Kopp* and *Anthony J. Steinmeyer*, Attorneys, Department of Justice were on the brief for appellees, Watson,

Secretary of the Cabinet & Assistant to the President for Intergovernmental Affairs, et al.

William P. Glendon with whom *Anthony F. Essaye, Jerry W. Markham, Timothy G. Smith* and *Robert B. Barnett* were on the brief, for appellee, Carter-Mondale Presidential Committee, Inc.

Before: ROBINSON and MACKINNON, Circuit Judges, and AUBREY E. ROBINSON, JR.,* United States District Court Judge for the District of Columbia

Opinion Per Curiam.

Per Curiam. Appellants, supporters of Senator Edward M. Kennedy in his quest for the Presidential nomination of the Democratic Party,[1] appeal from the dismissal by the district court of their action alleging that the defendants, members of President Carter's administration[2] and the Carter-Mondale Committee, have il-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Appellants are William W. Winpisinger, Patsy T. Mink, Vincent L. Connery, Julian Bond, Mareo Dellaca, Loren Callendar, and Edward DeSautel. Appellants Mink and Callendar allege that additionally they are candidates for seats as delegates to the 1980 Democratic National Convention.

[2] The individual defendants are Jack Watson, Secretary of the Cabinet and Assistant to the President for Intergovernment Affairs; Hamilton Jordan, Assistant to the President and Chief of the White House Staff; Frank Moore, Assistant to the President for Congressional Liaison; Jody Powell, Press Secretary to the President; Stuart Eizenstat, Assistant to the President for Domestic Affairs and Policy; Sara Weddington, Assistant to the President; Ann Wexler, Assistant to the President; Neil Goldschmidt, Secretary of Transportation; Moon Landrieu, Secretary of Housing and Urban Development; Patricia R. Harris, Secretary of Health, Education and Welfare; Cecil D. Andrus, Secretary of the Interior; Bob Bergland, Secretary of Agriculture; Ray Marshall, Secretary of Labor; and Philip M. Klutznick, Secretary of Commerce.

[Footnote continued on page 3a]

legally employed their public authority and expended federal funds to promote the President's renomination. Appellants contend that this results in constitutional violations by diminishing the effect of their efforts for Senator Kennedy. They accordingly seek declaratory and injunctive relief against the practices detailed in their complaint.

The district court, in an order dated February 7, 1980,[3] and an accompanying memorandum opinion,[4] dismissed the complaint for lack of standing by appellants to bring the action.

We affirm, both on the basis of lack of standing and also on the ground that prudential considerations would preclude the court from exercising jurisdiction in any event.

I

The Complaint

Appellants, plaintiffs in the district court, are seven of Senator Kennedy's supporters. The appellees, defendants in the district court, are seven Cabinet Officers, seven Presidential assistants, and the Carter-Mondale Presidential Committee, the principal campaign committee supporting the renomination candidacy of President Carter. The gravamen of appellants' allegations is capsulized in the introductory paragraph to their complaint:

> This is an action for declaratory judgment and injunction against defendants' misuse of federal power

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[2] [Continued]

Each of the individual defendants is sued in his or her official capacity. Complaint, ¶¶ 4-5, Joint Appendix (JA) 13.

Although President and Mrs. Carter, and Vice President Mondale also are named as among those who have committed allegedly unlawful acts, they are not defendants in this action.

[3] JA 43.

[4] JA 44-47.

and federal funds to purchase the Presidential renomination of Jimmy Carter, impairing the operation of the Nation's elective process embodied in the Constitution and injuring plaintiffs' constitutional rights under the First and Fifth Amendments, as voters, contributors and participants in the process of Presidential nomination. Defendants are Presidential subordinates engaged in a concerted course of conduct designed to use the public treasury for salaries, travel expenses, costs of meetings and other political outlays; to grant and withhold public employment based upon political support by the employee; and to promise and award federal programs and funds to communities as political inducements and rewards, all in order to obtain support for President Carter's renomination. Defendants' course of conduct, using the federal treasury to buy renomination, threatens the integrity of our democratic system of government and debases the election of the highest public official in the land.[5]

Although the appellants' 33-page complaint details numerous allegations in support of this general contention, a few specific examples, abstracted from the complaint, will provide a basis for a fuller understanding of the precise nature of the charges made against the defendants, and of our disposition of this appeal.

Appellants contend, for example, that defendant Jordan said that federal employees who were not barred from political activity by federal law are expected to perform political activities only for President Carter and that anyone in that category supporting Senator Ken-

[5] JA 10.

nedy would be dismissed.[6] Similarly, President Carter is alleged to have instructed the defendant members of his Administration to require their subordinates who were outside of the protection of the Civil Service Merit System to support his candidacy or suffer the threat of dismissal for refusing to do so.[7]

Several types of charges dealing with the alleged misuse of federal funds are also made. The defendant federal officials are alleged to have used their time during normal working hours, for which time they are paid out of the federal treasury for their work as federal officials, on trips made and activities conducted for the principal purpose of promoting President Carter's renomination campaign.[8] Allegations are also made that on trips taken for campaign purposes only partial reimbursement of the federal treasury was made, if at all, and only after the trip was actually taken. This delay in making reimbursement acts, according to the complaint, as an interest free loan by the treasury to the Carter-Mondale Committee.[9]

Similarly, the allegation is made that federal funds are being used to publish materials favorable to the President. For example, defendant Wexler is alleged to have had thousands of copies of a 49-page pamphlet entitled "The Record of President Carter's Administration" printed and mailed at federal expense. The purpose for this pamphlet is alleged to be the generation of support for the Carter campaign.[10] Defendant Weddington is alleged to have mailed 6,200 copies of a letter and

[6] Complaint ¶ 13, JA 17. Such dismissals would be unconstitutional under the recent decision in *Branti* v. *Finkel*, 48 U.S.L.W. 4331 (U.S. March 31, 1980). *See* n. 27, *infra*.

[7] Complaint ¶ 14, JA 17-18.

[8] Complaint ¶ 17, JA 19.

[9] Complaint ¶ 16, JA 19.

[10] Complaint ¶ 20(a), JA 22-23.

glossy poster displaying 100 photographs of women appointees in the Carter Administration two days after Senator Kennedy criticized "the Carter position concerning women" in a speech.[11] Other allegations in the complaint contend that Kennedy supporters were not invited to attend Presidential functions,[12] or to travel on the President's aircraft "Air Force One" because of their preference for Senator Kennedy.[13]

Political patronage in hiring is also contained in the allegations of the complaint; the defendant federal officials are alleged to have hired federal employees on the basis of political affiliation. For example, appellants contend that the 275,000 people to be hired to take the 1980 census are to be chosen on the basis of "patronage conferred upon those political figures who had or would support the Carter candidacy." [14] Appellants also identify the resignation of an Ambassador as a consequence of refusing to support the President's renomination and instead supporting Senator Kennedy.[15] Along the same lines, another person is alleged to have had the suggestion made to him that he would receive favorable consideration for a high federal appointment as a reward for his supporting the Carter candidacy.[16]

Finally, appellants contend that the granting of federal funds to states and cities has been conditioned upon officials of those entities supporting the Carter candidacy,[17] and that the timing of the announcement of fed-

[11] Complaint ¶ 20(b), JA 23.

[12] Complaint ¶¶ 20(c)(d), JA 23.

[13] Complaint ¶ 20(e), JA 24.

[14] Complaint ¶ 22, JA 24.

[15] Complaint ¶ 23, JA 25.

[16] Complaint ¶ 24, JA 25.

[17] Complaint ¶¶ 25-51, JA 25-36.

eral grants has been coordinated to provide the maximum benefit to President Carter's renomination campaign. As a corollary to this allegation, appellants charge that in areas where official support has been for Senator Kennedy, assistance has been denied.[18]

Collectively, appellants contend that the use by the defendant federal officials of the resources of the federal government provide the Carter-Mondale Committee with federal support. This, in turn, is alleged to harm appellants in four distinct ways. As supporters of Senator Kennedy, they charge that the challenged actions violate their First Amendment right to "free expression and free association in the electoral process in support of their preferred candidates." As voters, they argue that these practices are alleged to "diminish, dilute and nullify plaintiffs' votes, plaintiffs' lawful contributions of money, and their other efforts to nominate the candidates of their choice." [19]

As contributors to Senator Kennedy's campaign they claim infringement of a right to effectiveness of their contributions equal to those of President Carter's supporters. And two appellants, candidates for delegate seats at the Democratic National Convention, assert that the conduct complained of has lessened their changes of selection.[20] In addition, appellants assume several more general positions. Violation of appeliants' rights to equal protection of the laws, secured by the Fifth Amendment, is also alleged by "depriving plaintiffs of an equal voice in the Democratic Presidential nomination process by their use of the federal treasury and federal power in support of the Carter nomination." [21] Lastly, violations of laws relating to the election process, appropriations

[18] Complaint ¶¶ 35-37, JA 31-32.

[19] Complaint ¶ 54, JA 37.

[20] Complaint ¶¶ 3(b), 3(f), 59, JA 11, 12, 30-31.

[21] Complaint ¶ 55, JA 37-38.

and the legislative authority of Congress are also alleged.[22]

Appellants request injunctive and declaratory relief against the practices complained of.[23]

II

Standing

The district court dismissed this action for lack of standing. The court did not reach, for that reason, the issue of whether prudential considerations would also bar plaintiffs' claims. Although we affirm the dismissal, we do so both on the basis of lack of standing and prudential concerns. As our discussion on these issues reflects, we do not consider these two concepts to be clearly severable in this case; consequently, we rely upon both grounds for our affirmance.

A

Standing is an absolute condition which the plaintiff must meet in order to maintain an action. "Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination." [24]

The district court held that the plaintiffs failed to demonstrate standing because they failed to allege a "distinct and palpable injury" to themselves, quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) which is direct and concrete, and not abstract, remote or speculative, citing *O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

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[22] Complaint ¶¶ 55-58, JA 38-39.

[23] Complaint ¶¶ 60-63, JA 41-42.

[24] 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3531 at p. 175-76 (1975).

The court further held that plaintiffs must establish an injury "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the Court," citing *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) and *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59 (1978).[25] In conclusion the court found that the plaintiffs' inability to influence the election process or to induce support for Senator Kennedy may turn on "a number of factors that are unrelated to defendants' alleged abuses." This variety of factors operating on the electorate at any given time, would require extreme speculation to establish a relationship between the defendants' alleged conduct, and the plaintiffs' injury.[26]

The court also held that the appellants' allegations do not bring them within the Supreme Court's reapportionment cases, a series of opinions, beginning with *Baker* v. *Carr*, 369 U.S. 186 (1961), in which the Supreme Court premised standing to sue on allegations of a direct, tangible injury to the plaintiff's voting rights. In *Baker* the injury consisted of the inequality of an individual's vote who lived in a "disfavored" county, which resulted in a "gross disproportion of representation to the [voting] population." 369 U.S. 207. Nor did the district court find the injury complained of similar to that in *Elrod* v. *Burns*, 427 U.S. 347 (1976) where a policy of patronage which resulted in the dismissal of public employees, within a specified group, who failed to support the incumbent party was held invalid.[27] Additionally, the

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[25] Mem. Op. at 2, JA 45.

[26] Mem. Op. at 4, JA 47.

[27] While appellants do not have standing to contest allegedly threatened discharges for refusal to support President Carter, individual employees who are affected may be entitled to relief absent "demonstrat[ion] that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti* v. *Finkel*, 48 U.S.L.W. 4331, 4334 (March 31, 1980).

district court noted that the opinion by the United States Court of Appeals for the Seventh Circuit in *Shakman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (1970) *cert. denied sub. nom.* 402 U.S. 909 (1971), was implicitly modified by that Circuit's opinion in *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F.2d 1115 (1977).

In sum, the district court concluded that the appellants had failed to show either injury in fact to themselves or a causal connection between the injury and the defendants' conduct. While *part* of the conduct complained of is a matter of public knowledge, the intent of the parties and the consequences of their acts upon appellants' are open to question and wide speculation and we agree with the conclusions of the district court.

B

Although the determination of whether there is an injury which will support appellants' standing is necessarily determined on an *ad hoc* review of the facts in each case, *Harrington* v. *Bush*, 553 F.2d 190, 206 (D.C. Cir. 1977), and while generalizations about standing are "largely worthless as such", *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 151 (1970),

> "the *basic concern* of the standing doctrine is that *the individual complaining party have such a strong connection to the controversy that its outcome will demonstrably cause him to win or lose in some measure. Harrington* v. *Bush, supra*, 553 F.2d at 306. (emphasis in original).

Appellants here identify the harm which they have suffered as the dilution of their efforts on Senator Kennedy's behalf by the actions of the federal defendants in utilizing the vast resources available to the Administration to promote President Carter's quest for renomination. Necessarily, appellants conclude, there is a causal connection between the actions they allege the federal defendants have taken and the injury they alleged. We cannot agree that there is either an irresistible or a legally sufficient connection between these matters.[28]

Whether phrased as "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of [the] issues," *Baker* v. *Carr*, 369 U.S. 186, 204 (1961); the existence of a "distinct and palpable injury," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 114 (1978), quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1974); or a "[c]oncrete injury, whether actual or threatened, [which] is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution," *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220-21 (1973); the appellants must demonstrate that the "asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Warth* v. *Seldin, supra*, 422 U.S. at 505.

Put another way, one of the ingredients indispensable to standing is "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power Co.* v. *Carolina Env. Study Group, supra*, 458 U.S. at 72, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections,

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[28] This action was filed prior to Senator Kennedy's New York, Massachusetts, and Connecticut primary victories of which we take judicial notice, including the publicized "promises" that massive financial aid to New York would continue. F.R.Ev. 201(b)(f). Those primary wins underscore the fallacy of merely assuming an adverse impact upon Kennedy supporters from the activities charged in the complaint.

caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is "fairly traceable" to any particular event. In the case before us, whether an appellant is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to appellees. Courts are powerless to confer standing when the causal link is so tenuous. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1972); *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 45 (1976).[29]

We thus conclude that appellants have failed to carry their burden to demonstrate the causality prerequisite to standing and we feel that appellants could not obtain effective relief from the courts for the reasons we discuss in Part III of this opinion, *infra*.

We hold, then, that appellants lack standing to maintain this action.

III

Prudential Barriers

Although the district court declined to address the question of whether prudential considerations would also preclude maintenance of this action, we feel that they are inextricably linked to the question of standing in this case. In the statement of facts, we have detailed the

[29] *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, No. 79-1123 (D.C. Cir., February 8, 1980) addressed a situation similar to the one we find here: a failure to allege facts showing a substantial likelihood that a grant of the relief sought would redress the plaintiff's asserted injuries, resulting in a holding that the plaintiff's lacked standing to bring the action. In *Greater Tampa* the relief requested by the plaintiff—better air service—could be obtained only by the consent of the government of the United Kingdom. Plaintiffs consequently failed to meet the standing requirement of demonstrating a justiciable controversy.

nature of appellants' allegations against the defendants, which will not be repeated here. A fair characterization of the accusations would necessarily include the observation that they relate, quite literally, to virtually every discretionary decision made by the Administration acting through these high government officials. Consequently, any relief, to be effective, would have to be as broad as the authority of the high offices held by the federal defendants. Whether shaped as declaratory relief, or injunctive relief, or both, the court's judgment would have to interject itself into practically every facet of the Executive Branch of the federal government, on a continuing basis, for the purpose of appraising whether considerations other than pure public service motivated a particular defendant in the performance of his or her official duties.

Prudential barriers upon courts clearly preclude judicial interference in the daily responsibilities of these defendants and the resultant shift of such decisionmaking from the Executive to the Judicial Branch. In the most basic sense, prudential barriers developed as an adjunct to standing to restrict the courts to the appropriate ambit. The judiciary is not to act as a management overseer of the Executive Branch. In *Public Citizen, Inc.* v. *Simon*, 539 F.2d 211, 217 (D.C. Cir. 1976) we ruled that taxpayer standing did not exist where

> appellants' challenge can be characterized as regulatory aim—to compel an accounting by White House officials of the time spent on campaigning as opposed to official duties—and the "executive spending" on the salaries of the White House Staff members merely an incidental feature.

539 F.2d at 217. If standing were found here the result would also be "regulatory." Standing, in both its constitutional and prudential dimensions, is "founded in concern about the proper—and properly limited—role of the

courts in a democratic society." *Warth* v. *Seldin*, *supra*, 422 U.S. at 498. This concern is sharpened when it would bring two coordinate branches of the government into conflict. *Schlesinger* v. *Reservists To Stop The War*, *supra*, 418 U.S. at 222.[30]

Providing the requested relief would unquestionably bring the court and the Executive Branch into conflict because the court would be placed in the position of evaluating every discretionary consideration, including those which result in a decision not to take a particular action, for traces of political expediency. This would necessarily require the court to determine how the particular matter would be resolved if detached from the political consequences to President Carter's renomination efforts. As the factual statement to this opinion reflects, the sweeping breadth of complaint would require

[30] *See also* Justice Powell's concurring statement in *Goldwater* v. *Carter*, 100 S. Ct. 533-35 (1979) dealing with the question of whether the President could unilaterally abrogate a treaty with the Republic of China (Taiwan). Although Justice Powell would have dismissed the complaint as not ripe for judicial review, he also outlined the considerations, which he did not find present in *Goldwater*, relating to the prudential concerns "calling for mutual respect among the three branches of government." *Id.* at 535. Justice Powell did not feel the constitutional interpretation required, if the case were ripe, implied any lack of respect for a coordinate branch of government.

But for this court to undertake the inquiry which would be required in this case would be to invade the far corners of the Executive Branch by subjecting countless Administration decisions to judicial scrutiny for any vestige of political motivation. That action would necessarily carry with it an implied lack of respect for a coordinate branch of government, in addition to being unmanageable. Neither would that inquiry proceed on the basis of a discrete judicial standard, the situation Justice Powell described as being present in *Goldwater*. Rather the court would be assessing the correctness of an action assigned to the Executive Branch and often requiring substantial supporting personnel and expertise, as well as a significant time investment. The review which appellants seek is not even remotely related to that ordinarily undertaken by the judiciary.

correspondingly broad relief. The courts are not suited to undertake a neutral consideration of every Executive action, ranging from White House invitations and space reservations on the Presidential aircraft to the decision to award funds to a particular state or other political subdivision for general or specific projects.[31]

Elrod v. *Burns*, *supra*, and *Shakman* v. *Democratic Organization of Cook County*, *supra*, are not inconsistent with this holding. In *Elrod* a patronage process which resulted in a dismissal from public employment on the basis of political affiliation was held invalid. Justice Brennan, in his plurality opinion, noted that neither the political question nor the separation of powers doctrines precluded consideration of the case because they arose only in the context of the Court's relationship with a coordinate branch of the federal government, not the states. Obviously, that is not the situation here where coordinate branches of government are directly involved. Additionally, the abuses alleged in *Elrod* were far more concrete and did not involve the element of discretion which is so pronounced in this appeal. And see note 27 *supra*.

And while we accord due respect to the Seventh Circuit's opinion in *Shakman*, *supra*, we find it distinguishable from the case at bar.[32] *Shakman* accorded standing

[31] A case presents a nonjusticiable question when there is "a lack of judicially discoverable and manageable standards for resolving it." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). See also *Gilligan* v. *Morgan*, 413 U.S. 1, 8 (1973); *Coleman* v. *Miller*, 307 U.S. 433, 454-455 (1939); *Goldwater* v. *Carter*, 48 U.S.L.W. 3402, 3402 (U.S. Dec. 13, 1979) (Powell, J., concurring in the judgment); *Occidental of Umm al Qaywayn, Inc.* v. *A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978).

[32] We note that Shakman was a 2-1 decision, Judge Swygert dissenting on the ground of inappropriateness of judicial intervention, the thesis we maintain here. We also note that *Shakman* was decided in 1970, prior to many of the Supreme Court opinions reassessing the standing requirement, e.g. *O'Shea* v. *Littleton*, *supra*,

to an independent candidate, and a supporter, to challenge aleged abuses which utilized the incumbent party's position to use a system of coercing political activity through the threat of arbitrary dismissal for failure to participate. *Shakman* dealt with an identifiable system of abuses, involving a single County, not a coordinate branch of the federal government. Additionally, the district court, on remand, was aided by the consent judgment entered into by a number of the defendants. The district court left open, for further development, the remedy to be applied in *Shakman*.

It is axiomatic that the request for declaratory relief is discretionary with the court, and that the request should be denied where "it will not terminate the controversy or serve a useful purpose." [33] As Chief Justice Warren remarked in *Zemel* v. *Rusk*, 381 U.S. 1 (1965):

> However, the Declaratory Judgment Act, 28 U.S.C. § 2201 (1958 ed.), 'is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.' *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241.

Warth v. *Seldin, supra, Simon* v. *Eastern Kentucky Welfare Rights Org., supra,* and *Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. 59 (1978). A recent standing case decided by the Seventh Circuit, *Mulqueeny* v. *National Commission on the Observance of International Women's Year, supra,* although not directly comparable with *Shakman* suggests a tightening of the standards for determining standing. It should also be noted that unlike the government employees in *Shakman,* the defendants here have no fixed hours, are not paid on an hourly basis and their working day is largely within their own discretion.

[33] E. Borchard, *Declaratory Judgments* 135 (2d ed. 1941). Because declaratory relief is often a predicate to injunctive relief, *Powell* v. *McCormack,* 395 U.S. 486, 499 (1968), it should be drawn with sufficient precision to identify the specifics of any unlawful practice so as to provide a basis for the entry of an injunction, should one follow. Additionally, declaratory relief, to be effective, must be phrased with precision in any event or it does not meet the needs of the parties and consequently would not resolve the dispute underlying the action.

In keeping with the Constitution's separation of powers of the three branches we elect to exercise such discretion by refusing to hear this case which would set a precedent by placing the judiciary in the middle of myriads of fundamental decisions that the framers of the Constitution considered they were vesting in the executive branch of government. Similarly, an injunction must be drawn with sufficient specificity to remedy the harm shown. *Aviation Consumer Action Project* v. *Washburn,* 535 F.2d 101, 108 (D.C. Cir. 1976). The relief which appellants request would be so broad as to cause judicial intrusion into virtually every facet of the Executive Branch; narrower relief would be ineffective.[34]

Consequently, not only a lack of standing, but also prudential limitations, bar this action.

We affirm the order of the district court dismissing the action.

So ordered.

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[34] The fact that the Federal Election Campaign Act of 1971 was modified by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339, to remove the spending of appropriated funds from the definition of "expenditure," and thus from the reach of the reporting and penalty provisions of the Act, 2 U.S.C. §§ 434(a), 441(j), does not support judicial review of these allegations as the legislative history explains that the change was made because "[m]isuse of appropriated funds is a violation of Federal law and subject to enforcement by other agencies" than the Federal Election Commission. H.R. Rep. No. 96-422, 96th Cong., 1st Sess. (1979). The use of the words "other agencies" suggests that actions of this kind were *not* contemplated to remedy violations. The Congress and the electorate also have a role in correcting such abuses.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3471

[Filed Feb. 7, 1980]

WILLIAM W. WINPISINGER, *et al.*,
Plaintiffs

v.

JACK WATSON, *et al.*,
Defendants

MEMORANDUM OPINION

Plaintiffs, seven voters and supporters of the Presidential campaign efforts of Senator Edward M. Kennedy, have filed this action alleging that defendants, seven Cabinet officers and seven Presidential assistants have misused federal funds and abused federal power and thereby diminished the value of their efforts to promote Senator Kennedy's candidacy. Although numerous instances of misconduct are recited, plaintiffs' complaint can be summarized as alleging that defendants have used federal funds for the campaign travel salaries of various administration officials; they have conditioned public employment of high level federal employees on their support for the President, and used federal grants and loans to states and municipalities to coerce political support.

Defendants have moved to dismiss this action on grounds of lack of standing. After careful consideration of defendants' motions, plaintiffs' opposition, defendants' replies, and the oral argument of counsel at the hearing in this matter, the Court for the reasons set forth below,

concludes that defendants' motions must be granted and that this action must be dismissed.

Discussion

"[A] 'fundamental aspect of standing' is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated' " . . . *United States* v. *Richardson*, 418 U.S. 166, 174 (1974), *quoting from Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

A plaintiff, in order to invoke the authority of the federal court, must allege a "distinct and palpable injury to himself," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), which must be direct and concrete, not abstract, remote or speculative. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). In addition, plaintiffs must also establish injury "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the Court," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59 (1978). According to the law of this Circuit, "[t]he determination [of] injury must necessarily proceed on an *ad hoc* scrutiny of the facts." *Harrington* v. *Bush*, 553 F.2d 190, 206 (D.C. Cir. 1977).

Plaintiffs claim that defendants' improper activities have produced inequalities in the election process which have interfered with their equal right to election participation. These inequalities allegedly dilute or diminish the effectiveness of their support for Senator Kennedy. In arguing that they have standing to maintain this action, they rely on a line of cases beginning with *Baker* v. *Carr*, 369 U.S. 186 (1962), where standing is granted in cases where dilution of the effectiveness of the vote is alleged. *See also*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

The Court, however, does not construe plaintiffs' allegations of injury as falling within this line of cases. In contrast to what plaintiffs complain of here, Baker and its progeny concentrate on the direct and concrete injury that occurs when election districts are malapportioned; that is, when districts with greatly varying populations elect the same number of representatives. It is plain that in those cases the vote of people in districts with larger populations is diminished considerably. *See Wesberry* v. *Sanders*, 376 U.S. 1 (1964). Here, plaintiffs complain, in effect, that President Carter's misuse of the incumbency has rendered them unable to garner the support they had anticipated for Senator Kennedy. Plaintiffs complain, in other words, of their inability to persuade people to vote for Senator Kennedy. How other people vote, in the Court's view, does not in any way relate to plaintiffs' own exercise of the franchise and further does not constitute concrete and specific judicially cognizable injury. The Court finds the admonition of the Court of Appeals in *Daughtrey* v. *Carter*, 584 F.2d 1050 (D.C. Cir. 1978) particularly instructive. In denying plaintiffs' standing where similarly vague and abstract claims of injury were made, the Court remarked, ". . . *Baker* v. *Carr* does not make every alleged dilution of voting rights a sufficient injury to confer standing." *Id.* at 1056. This language is equally applicable to this case.

Nor is the Court convinced that the Seventh Circuit's opinion in *Shakman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970) lends plaintiffs any assistance. In *Shakman*, the Court found in an exceedingly brief discussion of the issue, that plaintiffs who made similar claims to those made in this case had standing to bring the action. It is doubtful, however, whether this case is controlling authority in the Seventh Circuit in light of the Court's more recent analysis of

standing set forth in *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F.2d 1115 (7th Cir. 1977). There the Court held in accordance with later Supreme Court decisions on the law of standing [1] that plaintiffs' failure to establish both injury in fact and the causal connection between the injury and defendant's conduct deprived them of standing.

Equally fatal to plaintiffs' claim here is the lack of a clear causal connection between defendants' conduct and plaintiffs' injury, the second requirement of standing. This causal connection, as stated previously, must establish that the injury is traceable to the challenged action of the defendant and not to the independent action of some third party not before the Court. *Simon, supra*, 426 U.S. at 41-42.

Plaintiffs' inability to influence the elections process, or to induce support for Senator Kennedy may turn on a number of factors that are unrelated to defendants' alleged abuses. President Carter's recent rise in the polls, for example, may be attributable to the country's support of his efforts to negotiate a release of the hostages in Iran. Senator Kennedy's standing in the polls may reflect public perception of his campaign performance. Because of the variety of factors that operate on the electorate at any given time, it is only through "reliance upon the most speculative of inferences," *Mulqueeny, supra*, 549 F.2d at 1121, that a relationship between defendants' conduct and plaintiffs' injury may be established. This type of speculation is clearly prohibited.

The Court, having concluded that plaintiffs lack standing in the constitutional sense to bring this action, it is

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[1] *See Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson, supra*, 418 U.S. 166 (1974).

not necessary to discuss whether prudential limitations would also bar plaintiffs' claims.

For the foregoing reasons, the Court concludes that these plaintiffs lack standing to bring this action and that plaintiffs' complaint must be dismissed. An appropriate order is entered herewith.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Dated: February 7, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3471

[Filed Feb. 7, 1980]

WILLIAM W. WINPISINGER, *et al.*,
Plaintiffs

v.

JACK WATSON, *et al.*,
Defendants

ORDER

Upon consideration of defendants' motions to dismiss, plaintiffs' opposition, defendants' replies, the oral arguments of counsel at the hearing in this matter and the entire record herein, and the Court having concluded for the reasons set forth in the accompanying memorandum opinion that plaintiffs lack standing to bring this action, it is by the Court this 7th day of February 1980,

ORDERED that defendants' motions to dismiss are hereby granted, and it is further

ORDERED that the instant action is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Supreme Court, U.S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM W. WINPISINGER, *et al., Petitioners,*

v.

JACK WATSON, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1636

WILLIAM W. WINPISINGER, *et al., Petitioners,*

v.

JACK WATSON, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT CARTER-MONDALE PRESIDENTIAL COMMITTEE, INC. IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the court of appeals nor that of the district court has yet been reported. References herein to those opinions are made to the appendices to the Petition for Certiorari wherein they are set forth.

JURISDICTION

Petitioners have invoked jurisdiction under 28 U.S.C. § 1254(1) with respect to the judgment of the court of appeals rendered April 10, 1980.

QUESTION PRESENTED

Do petitioners claiming that respondents' alleged activities devalue and dilute their efforts in support of Senator Edward M. Kennedy's campaign for the Democratic Presidential nomination suffer the specific,

concrete injury that is fairly traceable to respondents' acts required for constitutional standing, and present a case that is appropriate for court resolution within the prudential confines of judicial self-governance?

STATEMENT

Although hardly discernible from the Petition for Certiorari, this case simply and solely involves the issue of standing: whether or not these particular petitioners meet the constitutional and prudential tests that are required in order for them to pursue in the courts the allegations they have made in their complaint. The district court and the court of appeals concluded that they do not. And it is submitted that the conclusions reached by the lower courts are in accord with the requirements for standing enunciated by this Court and provide no basis for contending that review by the Court is warranted.

Petitioners are seven individuals who identify themselves as supporters of Senator Edward M. Kennedy, and who contend that the respondents' alleged activities devalue and dilute their support of his efforts to gain the Democratic Party nomination for President. Petitioners' broad-ranging complaint contains essentially three types of allegations: that senior Administration officials have carried out political activities at government expense; that federal employees have been improperly encouraged to support the President; and that federal grants to states and cities have been politically motivated.[1]

[1] Petitioners' grab bag of specific accusations includes such alleged "misdeeds" as: a Rhode Island Congressman, who does not support President Carter, was not invited on a flight aboard Air Force One (Complaint ¶20 (e)); invitations to the White House have been extended or withdrawn for political reasons (Complaint ¶20 (d)); White House briefings on public questions were conducted to generate support of the President's renomination (Complaint ¶20 (f)); the First Lady, Rosalyn Carter, only partially reimbursed the Treasury for portions of her expenses on mixed official and political trips (Complaint ¶18 (e)); and the President promised to maintain fuel supplies for residents of New Hampshire and Iowa (Complaint ¶51(d) and (e)). Moreover, in the section entitled "Facts" in their Petition, petitioners have recast the allegations in their complaint in even more strident terms, as well as wrung in an assortment of other unpleaded and exaggerated contentions.

Neither Senator Kennedy nor his campaign committee are petitioners. Also noticeably absent are federal employees allegedly coerced by respondents; local or state officials claiming improper diversions of grants from their jurisdictions, or indeed — with one insignificant exception[2] — anyone with any specific personal grievance whatsoever. Nor do the petitioners include any candidate allegedly denied access to the ballot, nor any voter allegedly denied the franchise, nor any campaigner allegedly restrained in his own political activities. Simply put, petitioners do not include any persons able to show the concrete, specific injury causally related to respondents' alleged acts that this Court has repeatedly made clear is required for standing.

Petitioners' complaint was filed on December 28, 1979. After briefing and oral argument, the district court on February 7, 1980 issued its Memorandum Opinion concluding that plaintiffs lacked both (l) the concrete, specific injury and (2) the causal relation between the alleged injury and defendants' acts, which are necessary for standing. (Mem. Op. 2-4.) In light of this determination, the district court concluded that "it is not necessary to discuss whether prudential limitations

[2] Petitioner Connery was allegedly slighted by not being invited to a White House function (Complaint ¶20 (c)).

would also bar plaintiffs' claims." (Mem. Op. 4.)

Petitioners appealed to the Court of Appeals for the District of Columbia Circuit, which on April 10, 1980, issued a unanimous opinion affirming the district court's decision, not only because of the absence of constitutional standing as determined by the district court, but also because of prudential limitations on standing. The court of appeals' decision is solidly premised on the requisites for standing as they have been enunciated by this Court; and as such it presents no issues that call for review.

Significantly, the Petition for Certiorari is virtually devoid of discussion of this Court's decisions on standing or the standing criteria set forth therein. Instead of addressing their standing, petitioners concentrate on the substantive issues they would wish to have determined by the courts. In doing so, however, petitioners ignore this Court's stricture that:

> [a] "fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated."

United States v. *Richardson*, 418 U.S. 166, 174 (1974), *quoting from Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

In sum, petitioners are engaged in an exercise designed to divert attention from the fact that they do not meet the requirements for standing that this Court has repeatedly prescribed.

REASONS FOR DENYING THE WRIT

1. As indicated, the single issue in this case is the standing of the petitioners. The Court, in a series of cases decided over the last six years, has articulated

three requirements for standing, two of them constitutional and the third prudential.

First, plaintiffs must show a "distinct and palpable injury" to themselves, *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), which must be concrete and specific, not remote or speculative, *see*, *United States* v. *Richardson, supra,* 418 U.S. at 177-78 (1974), and which must involve quantifiable and measurable injury to their own personal interests and not to those of some third party or the public overall. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208, 217 (1974).

Second, plaintiffs also must show a "'fairly traceable' connection between the claimed injury and the challenged conduct," *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 72 (1978), *quoting Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977). Phrased another way, petitioners must show "that the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power* v. *Carolina Env. Study Group, supra,* 438 U.S. at 74; *see also, Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, 426 U.S. at 43.

Third, plaintiffs also must satisfy the requirement of "prudential standing": that within the confines of judicial self-governance the court's action will maintain "the proper— and properly limited — role of the courts in a democratic society." *Warth* v. *Seldin, supra*, 422 U.S. at 498; *see also, Schlesinger* v. *Reservists Committee To Stop The War, supra*, 418 U.S. at 222.

The court of appeals determined that petitioners did not meet any of these requirements. That court's con-

clusion is in complete accord with, and compelled by, the decisions of this Court.

2. The soundness of the court of appeals' decision is so clear that on the issue of constitutional standing petitioners have been reduced to an argument premised on two serious mischaracterizations of the court of appeals' opinion.

Petitioners correctly note that the district court determined that they lacked both the requisite concrete injury to themselves[3] and the requisite causal connection between their claimed injury and the alleged acts of respondents. (Petition 11.) But petitioners then make the incorrect assertion that: "[T]he court of appeals rejected petitioners' standing on the causality ground alone. It did not affirm (and apparently rejected *sub silentio*) the district court's holding that petitioners had failed to show concrete injury at all (See, App. A 8a,11a)." (Petition 11.)

Yet at page 10a of its opinion, which is not cited by petitioners, the court of appeals stated:

> In sum, the district court concluded that the appellants had failed to show either injury in fact to themselves or a causal connection between the injury and the defendants' conduct. While *part* of the conduct complained of is a matter of public knowledge, the intent of the parties and the consequences of their acts upon appellants are open to question and wide speculation *and we agree with the conclusions of the district court.* (Second emphasis added.)

[3] In doing so, as the court of appeals noted (Appendix 9a), the district court distinguished *Baker* v. *Carr,* 369 U.S. 186 (1962), and its progeny, finding that those cases involved direct and concrete injury not present here. (Appendix 20a)

Clearly, the court of appeals agreed with *both* conclusions of the district court.

Similarly, petitioners erroneously contend (Petition 11-12, 15-16) that the court of appeals created a "guaranteed success test" (Petition 16), holding that to meet the causality requirement for standing petitioners "must show that their preferred candidate would win nomination *but for* defendants' illegal conduct." (Petition 15.) This is incorrect. At page 11 of the Petition, petitioners extract a clause from the court of appeals' decision without quoting the full sentence. They then attempt to construct an argument that the court below has developed an unprecedented requirement for standing.

Thus, they contend that the court of appeals characterized their injury as lying in "'the outcome of state presidential primary elections, caucuses and conventions'" (Petition 11 *quoting* the court of appeals at Appendix 11a-12a), and that the court required them to show that that "outcome" would necessarily be in favor of their candidate but for respondents' alleged conduct. (Petition 15.) The court's complete sentence from which this phrase is taken, however, makes clear not only that this phrase was not a characterization of petitioners' injury, but also that no "guaranteed success test" was contemplated:

> The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that *voter support* of a candidate is "fairly traceable" to any particular event.

(Appendix 11a-12a) (emphasis added).

Indeed, the court's opinion makes clear that it considered the issues before it in terms of whether the

respondents' alleged activities had an influence on voters sufficient to cause petitioners to suffer the alleged "dilution of their efforts on Senator Kennedy's behalf" (Appendix 10a) that forms the basis of their complaint. Clearly, the court decided that the factors that may influence an individual voter are so diverse that it could not conclude that the requisite causal relation existed between voters' decisions and the respondents' alleged activities.

In short, when fairly read, the opinion of the court of appeals (l) affirms the district court's finding of lack of concrete injury, as well as its finding of a lack of causal relation, and (2) does not impose a "guaranteed success test" with respect to causal relation.

3. Petitioners' argument with respect to the court of appeals' finding on prudential standing is similarly misplaced.

The Court concluded that granting the relief requested by petitioners would place the court

> in the position of evaluating every discretionary consideration, including those which result in a decision not to take a particular action, for traces of political expediency. This would necessarily require the court to determine how the particular matter would be resolved if detached from the political consequences to President Carter's renomination efforts. As the factual statement to this opinion reflects, the sweeping breadth of the complaint would require correspondingly broad relief. The courts are not suited to undertake a neutral consideration of every Executive action, ranging from White House invitations and space reservations on the Presidential aircraft to the decision to award funds to a particular state or other political subdivision for general or specific projects.

(Appendix 14a-15a) (footnote omitted).

Petitioners contend (Petition 18) that this "'prudential' reasoning" would "immunize the federal government from the reach of" the decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, _____ U.S. _____ (1980), and *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). This is not the case. The *Elrod*, *Branti*, and *Illinois State* cases involved allegations by public employees *themselves* that their own dismissals from public office were improperly based on political considerations. In those cases, the plaintiffs' threatened injuries were clear, their perpetrators were readily identifiable, and the judicial relief requested was narrow and straightforward. These cases simply highlight the lack of such characteristics here. Clearly, by also dismissing this case on prudential standing grounds, the court of appeals was not immunizing the federal government from judicial intervention where manageable claims have been asserted by the proper parties (*see*, Appendix 5a n. 6 and 15a n. 31).

Further, after constructing this "straw man" of immunization of the federal government, petitioners attempt to discredit it by citing a series of cases in which this Court countermanded a specific Presidential decision or in which a lower court inquired into whether political motivation affected a particular decision by an Executive Branch official. (Petition 16-17 nn. 14 & 16.) In each case cited by petitioners, however, the plaintiffs alleged a specific violation of law and sought specific relief to reverse that precise action.[4] Again, the contrast

[4] Thus, each of this Court's decisions cited at footnote 14 of the Petition involved precisely focused allegations of a specific wrongful action as to which appropriate relief could be fashioned: *United States* v. *Nixon*, 418 U.S. 683 (1974) (relief sought: enforcement or quashing of subpoena concerning Presidential tape recordings); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977) (relief sought: invalidation of Presidential Recordings and Materials Preservation Act); *Humphrey's Executor* v. *United States*,

with this case is marked, as here the court would be required to assume a role of continuing overseer of the Executive Branch. Thus, the cases cited by petitioners do not support a grant of certiorari here.

4. Petitioners, straining to find a conflict between circuits as a basis for a grant of certiorari, also contend that the decision of the court of appeals in this case "squarely conflicts" with *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir. 1970). (Petition 20) But *Shakman*, which contained no meaningful discussion of standing, was decided in 1970,

295 U.S. 602 (1935) (relief sought: determination that Federal Trade Commission Act lawfully restricted Presidential ability to remove a Commission member); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (relief sought: injunction prohibiting Presidential seizure of steel mills); and *Train* v. *City of New York*, 420 U.S. 35 (1975) (relief sought: order that the Environmental Protection Agency allot the full grants authorized by the Federal Water Pollution Control Act). Similarly, none of the cases cited by petitioners at footnote 16 has relevance to this case. They involve either a suit against a member of the Executive Branch (and have no other pertinence to the issues raised in this case) or a contention that excessive political pressure influenced a particular action by a public official. None involve the sweeping judicial intervention into the full gamut of Executive decision-making such as is demanded by petitioners here.

Petitioners also suggest (Petition 13 n. 11) that the court of appeals would not have relied on petitioners' lack of prudential standing as a ground for dismissal if the allegations of the complaint had involved racial discrimination. But this case stands in sharp contrast to discrimination cases, where the Constitution by its terms prohibits the intrusion of racially discriminatory considerations into public decision-making. Here, unlike racial discrimination cases, the relief requested by petitioners would compel the court "to undertake a *neutral* consideration of every Executive action" (Appendix 15a) (emphasis added). In racial discrimination cases, there is no weighing of public policy against discrimination; there is no "neutrality." The Constitution is unequivocal in its ban on any form of racial discrimination, and would make the task of a court very different from that here, where the court's inquiry could not "proceed on the basis of a discrete judicial standard." (Appendix 14a n. 30.)

when it was generally believed that the concept of standing had "been almost completely abandoned." *Reservists Committee To Stop The War* v. *Laird*, 323 F. Supp. 833, 839 (D.D.C. 1971), *reversed sub nom. Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974). As the court of appeals noted (Appendix 15a n. 32), this Court, in a series of cases subsequent to *Shakman*, has rearticulated and reemphasized the requirements for standing. Indeed, this Court's renewed focus on standing was recognized by the Seventh Circuit in its 1977 decision in *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F. 2d 1115 (7th Cir. 1977) (dismissing for lack of standing a suit by opponents of the Equal Rights Amendment who claimed to have been competitively disadvantaged in their support of the ERA by the allegedly illegal lobbying activities of the National Commission, a federally funded organization). In light of *Mulqueeny*, it is highly doubtful that *Shakman* remains good law today even in the Seventh Circuit. In short, *Shakman* presents no real conflict between the circuits.[5]

5. Finally, petitioners conclude their argument as they began it, with grandiose claims that the decision below leaves "basic political rights without a remedy" and "our constitutional scheme defenseless." (Petition 15, 22.) This Court responded to this type of contention

[5] Petitioners seek to resuscitate *Shakman* through reference (Petition 20-21) to a footnote in Mr. Justice (then Circuit Judge) Stevens' 1972 opinion for the Seventh Circuit in *Illinois State Employees Union* v. *Lewis, supra*, 473 F.2d at 569 n. 17, and to a footnote in Mr. Justice Powell's dissent in *Elrod* v. *Burns, supra*, 427 U.S. at 382 n. 5. In both instances, however, the plaintiffs were threatened or discharged employees and the footnote references to *Shakman* adverted to its inapplicability to the issues before the court.

when it stated in *United States* v. *Richardson*, *supra*, 418 U.S. at 179:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

See also, Schlesinger v. *Reservists Committee To Stop The War, supra,* 418 U.S. at 227. Moreover, whether other potential plaintiffs could have established standing to pursue the type of allegations in petitioners' complaint is not in issue here. Finally, as the court of appeals suggested (Appendix 17a n. 34), there exist other vehicles for the examination of such types of allegations.[6] Thus, the court of appeals' reasoned finding that petitioners lack standing does nothing to undermine our constitutional scheme of government; it adheres to it.

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[6] For example, an incumbent President's campaign is subject to the contribution and expenditure limitations, the disclosure and reporting requirements, and other strictures of the Federal Election Campaign Act of 1971, as amended, and of the Federal Election Commission. 2 U.S.C. §431 *et seq.;* 11 C.F.R. §§100-115, 9032-9038 (1977). Indeed, FEC Regulations apply to such matters as the appropriate method for allocating costs between the governmental and campaign-related portions of combined official and political travel (11 C.F.R. §106.3), issues which are adverted to in the complaint. Further, expenditures from appropriated funds and other uses of government resources by White House employees and Cabinet Secretaries are subject to review by the Comptroller General and the General Accounting Office, 31 U.S.C. §53; 3 U.S.C. §105(d), and to Congressional oversight. Moreover, each of the federal grant or jobs programs which petitioners mention in their complaint is subject to specific statutory criteria established by Congress, to internal department audit (*see,* Inspector General Act of 1978, Pub. L. No. 95-451, 92 Stat. 1101 (1978)) and to Congressional oversight. White House employees are subject, under the Civil Service Reform Act of 1978, 5 U.S.C. §§1201,1206, to investigation and prosecution by the special counsel of the Merit Systems Protection Board for any political misuse of official authority in violation of 5 U.S.C. §7324(a)(1), and are subject to regulations enforced by the Office of Government Ethics concerning employee conduct and the use of federal property, *see,* Executive Order 11222; 5 C.F.R. §735.202; 3 C.F.R. §100.735. In addition, with regard to any criminal violations such as those contained in 18 U.S.C. §591 *et seq.* (Federal Corrupt Practices Act), all high-ranking Administration officials are subject to the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition should be denied.

Respectfully submitted,

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No. 79-1636

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM W. WINPISINGER, ET AL., PETITIONERS

v.

JACK WATSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet reported. The opinion of the district court (Pet. App. 18a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1980. The petition for a writ of certiorari was filed on April 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, who are supporters of Senator Edward M. Kennedy's presidential campaign, have standing to challenge activities of respondent federal officials allegedly designed to influence the Democratic Party nomination process.

2. Whether the court of appeals correctly determined that prudential considerations bar petitioners' suit.

STATEMENT

Petitioners are supporters of Senator Edward M. Kennedy's campaign for the Democratic Party presidential nomination. They claim, in essence, that respondents—various Cabinet and White House officials and the Carter-Mondale Presidential Committee[1]—are improperly attempting to influence the nomination process through their policy decisions and use of federal money for political purposes. Petitioners' 33-page complaint refers to a myriad of allegedly politically-motivated activities by respondent government officials (see Pet. App. 3a-8a). These examples include the award of federal grant and loan money to the states of Florida, Maine, and Rhode Island and to the cities of Detroit, New York, and East St. Louis, and the refusal to award federal money to the cities of Chicago and Carbondale, Illinois (Pet. 4-9). Petitioners also emphasize the political campaigning of government officials (*ibid.*) and, relying primarily on newspaper articles, level the new charge that "someone" had "bought" the endorsement of President Carter by a New York newspaper publisher (Pet. 9-10).

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[1]This brief is submitted on behalf of the respondent federal officials. The Carter-Mondale Campaign Committee is separately represented.

The district court dismissed petitioners' suit for lack of standing (Pet. App. 18a-22a). The district court characterized petitioners' claim of diluted electoral influence as "vague and abstract" (*id.* at 20a) and stated that petitioners' "inability to influence the elections process, or to induce support for Senator Kennedy may turn on a number of factors that are unrelated to [respondents'] alleged abuse" (*id.* at 21a). The court therefore concluded that petitioners "lack standing in the constitutional sense" (*ibid.*).

The court of appeals affirmed per curiam (Pet. App. 1a-17a). Emphasizing that standing requires "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct" (*id.* at 11a),[2] the court of appeals observed that the "endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event" (*id.* at 11a-12a). "Courts are powerless to confer standing," the court of appeals concluded, "when the causal link is so tenuous" (*id.* at 12a). In addition, the court recognized that the relief sought by petitioners would require the courts to scrutinize "virtually every discretionary decision made by the Administration acting through * * * high government officials" (*id.* at 13a), and would "interject" the court "into practically every facet of the Executive Branch of the federal government, on a continuing basis, for the purpose of appraising whether considerations

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[2]Quoting *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977).

other than pure public service motivated a particular [respondent] in the performance of his or her official duties" (*ibid.*). Such constant judicial oversight, ruled the court, would run counter to the separation of powers doctrine and raised an insurmountable "prudential barrier" to the maintenance of petitioners' suit (*id.* at 12-17a).

ARGUMENT

Petitioners seek review of the holdings below that they lack standing and that, in any event, prudential considerations bar their suit.[3] The decision of the court of appeals, however, is anchored in settled precedent and good sense. Review by this Court is unwarranted.

1. In order to satisfy the standing requirement, a plaintiff must demonstrate that (i) he has suffered injury in fact that is concrete rather than abstract, *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 221-223 (1974), and is "distinct and palpable * * * to himself * * *," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), and (ii) there is a "fairly traceable" causal link between the claimed injury and the challenged conduct. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

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[3]The complaint suggests that respondents' challenged conduct violates certain statutes. None of these statutes contains an express private right of action, and it is doubtful in light of this Court's recent decisions that an implied private right of action may appropriately be implied. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979).

The gravamen of petitioners' complaint is, as the court of appeals noted (Pet. App. 10a), the "dilution of [petitioners'] efforts on Senator Kennedy's behalf" as a result of the challenged conduct. Even assuming that this injury is sufficiently concrete, distinct and palpable to satisfy the first prerequisite—a doubtful assumption rejected by both courts below[4]—there is no "fairly traceable" connection between this alleged injury and the challenged activities of respondents. As the court of appeals observed (*id.* at 11a-12a), "[t]he endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." In short, it is nothing more than "unadorned speculation" to suggest that the alleged conduct has had or will have any appreciable impact on petitioners' efforts on behalf of Senator Kennedy. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, 426 U.S. at 44; *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 618 (1973); *Warth* v. *Seldin*, *supra*, 422 U.S. at 507. Compare

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[4]Petitioners claim (Pet. 11) that the court of appeals rejected *sub silento* the district court's holding that the type of injury relied on by petitioners was not sufficiently concrete to establish injury in fact. To the contrary, the court of appeals expressly approved this holding of the district court (Pet. App. 10a).

Arlington Heights v. *Metropolitan Housing Dev. Corp.*, *supra*, 429 U.S. at 264 (sustaining standing because there was at least a "substantial probability" that the relief sought would ameliorate the plaintiff's injury).[5]

Petitioners contend (Pet. 15) that the court of appeals held that the requisite degree of causality can be established only by demonstrating that Senator Kennedy would win the Democratic nomination "but for" respondents' alleged conduct. This is not so. The court of appeals merely held (Pet. App. 11a-12a) that petitioners' theory of causality was "so tenuous" that the alleged injury was not "fairly traceable" to the alleged conduct. The court required no more than a fair and substantial relationship between the alleged injury and the challenged conduct. The court did not require "but for" causality or require a showing that in the absence of any violations Senator Kennedy would win any primary, caucus, or convention.

Petitioners' argument (Pet. 15-16) is not improved by the fact that voters have standing to challenge the malapportionment of legislatures and the stuffing of ballot boxes. See *Baker* v. *Carr*, 369 U.S. 186, 204-208

[5]In an apparent effort to address their failure to establish a causal nexus between the alleged injury and the challenged conduct, petitioners characterize (Pet. 12) their injury as simply an injury to their interest in supporting a candidate in an election free of any irregularities. Because every campaign irregularity has a direct impact on this interest, petitioners suggest that they have satisfied the causality element. The flaw in this approach is that any such interest in error-free campaigns—irrespective of whether any irregularities "in fact" injure petitioners' efforts in a concrete way—is nothing more than an assertion of an interest common to all citizens. So defined, that interest, lacking as it does any concrete connection to petitioners' endeavors, is too abstract to satisfy the standing requirement.

(1962), and cases cited therein. In such cases, the causal relationship between the dimunition of the franchise and the challenged action is clear and does not depend on "unadorned speculation." Malapportionment, for example, reduces the effectiveness of a vote by a degree capable of precise mathematical expression. In sharp contrast, there is no reasonably certain theory that could possibly correlate respondents' alleged actions with the effectiveness of ballots cast for Senator Kennedy.

2. The court of appeals also correctly barred this suit for the soundest of prudential reasons. Petitioners' suit, if allowed to proceed, would necessarily require (i) discovery, (ii) trial, and (if successful) (iii) judicially-supervised relief—all unavoidably entailing detailed and continuous judicial inquiry into the nature of, motivations for, and political impact of "virtually every discretionary decision" of the President, his assistants, Cabinet officers and many other senior officers of the Executive Branch (Pet. App. 13a). This inquiry presumably would comprehend the full length of the campaign. On petitioners' theory, for example, whenever an Administration official traveled or made a speech, ostensibly for policy reasons, the extent of his "political" motivation would be an issue for the courts. And, whenever an agency granted federal aid to one geographic area, or denied it to another area, the courts would have to evaluate the responsible officials' motivation. Such unprecedented,[6] daily supervision of the entire Administration not only would be unmanageable

[6]No decision of any court has ever suggested so sweeping a judicial oversight of the executive function. The decisions cited by petitioners (Pet. 16-17 n.14) approved only narrow injunctions or subpoenas directed to the Chief Executive or senior officials solely with respect to an isolated action.

and ineffective, but also would inflict substantial damage on the principle of separation of powers. See *Schlesinger* v. *Reservists to Stop the War*, *supra*, 418 U.S. at 222; *O'Brien* v. *Brown*, 409 U.S. 1, 4-5 (1972).[7] Prudence counsels against any such undertaking.

3. Finally, petitioners' claim (Pet. 20) that the court of appeals' decision "squarely conflicts" with *Shakman* v. *Democratic Organization of Cook County*, 435 F. 2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971), is incorrect. While *Shakman* suggests that a local candidate may have standing to challenge local patronage practices which put him at an "electoral disadvantage," that suggestion is dubious in light of this Court's subsequent decisions in *Simon*, *Warth*, and other cases clarifying the causality requirement and the role of prudential considerations.[8] More recently, the Seventh Circuit, in *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F. 2d 1115, 1121 (1977),

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[7] *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), are not in conflict with the decision below. In those cases, (i) the injury was concrete (loss of job) and directly related to a firing decision based solely on party affiliation, and (ii) effective and manageable relief was plainly possible by a narrow declaration that the discharge policy was unlawful. *Elrod* and *Branti*, while supporting the proposition that certain abuses of political patronage may be remedied by the courts, involved no question of standing, prudential or otherwise, and in no sense authorized petitioners to pursue their broad attack upon the nomination process.

[8] The most recent opinion on remand in *Shakman* holds that a candidate may not assert the employment rights of public employees and applicants for public employment merely because violations of those rights make it more difficult for the candidate to win an election. *Shakman* v. *Democratic Organization of Cook County*, 481 F. Supp. 1315, 1329 (N.D. Ill. 1979).

has held that a group lacked standing to challenge an agency's alleged violations of law that the group felt obstructed their efforts to defeat legislation concerning the Equal Rights Amendment. The court held that the group's interest was merely an abstract interest in a political issue and that, in any event, it was "wholly conjectural" whether there was any relationship between the agency's conduct and the alleged harm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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1. Respondents assert [1] that petitioners did not satisfy the concrete injury-in-fact requirement for Article III standing, and that the Court of Appeals so held in its off-hand reference to the district court's opinion. If indeed the Court of Appeals really intended so to hold—which we doubt (*compare* Pet. at 11 with Pet. App. 10a)—it wholly departed from the long line of decisions of this Court recognizing as concrete various kinds of injury to First Amendment and Equal Protection rights

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[1] Federal Respondents Opp. at 4; Carter-Mondale Opp. at 6.

related to the political process—dilution of the vote, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), *Baker* v. *Carr*, 369 U.S. 186 (1962); injury to the ability to make political contributions and make them effectively, *Buckley* v. *Valeo*, 424 U.S. 1 (1976); injury to the ability to associate effectively and to persuade others to associate with you for political purposes, *Illinois State Board of Elections* v. *Socialist Workers Party*, —— U.S. ——, 99 S.Ct. 983 (1979); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); injury to the opportunity to run for office,[2] *Bullock* v. *Carter*, 405 U.S. 134 (1972),[3] *Turner* v. *Fouche*, 396 U.S. 346 (1970).

When, as here, petitioners' votes are being diluted by votes purchased by the incumbent's use of federal grant funds; where their contributions to their candidate are lost in a sea of federal dollars used to pay substantial expenses of the incumbent's campaign; where the delegate-candidate petitioners must face opponents whose campaigns are aided by federal funds, and where the ears of political leaders and federal employees are closed to petitioners' efforts to persuade because of the bribe of federal grants and the threat of dismissal from federal employment—there is concrete injury to personal political rights in violation of the First Amendment and the Equal Protection Clause. To say otherwise would be to argue that everything in the political process is protected except

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[2] Two of the petitioners are candidates for the office of National Convention delegate.

[3] The Carter-Mondale Committee (Opp. at 3) implies that Senator Kennedy or his campaign committee would have greater rights than petitioners. But, as we noted in the petition and as stated in *Bullock*, it is petitioners as voters, contributors, participants and supporters of the candidate whose rights are constitutionally protected rather than the candidate's rights.

the right to a fair election against the incumbent—quite likely the most important right of all.[4]

2. The primary point made by the Government and the Carter-Mondale Committee is that petitioners are wrong when they contend that the lower court "imposed a guaranteed success test on standing to sue" and held that plaintiffs "must show that their preferred candidate would win nomination *but for* defendants' illegal conduct" (Pet. 15-16).[5] To prove their point, both quote the sentence in the opinion below that "the endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event." But this is just what we said. If petitioners have to isolate the damage done, through the dilution of their votes and campaign participation by the unconstitutional use of federal funds and federal power, from all other factors affecting the voters, they are in fact having to prove just what we said in the petition—that but for the unconstitutional efforts of the highest officials of the federal government voter support would have gone to petitioners' candidate. Standing, we submit, requires no such showing. Our injury is to our efforts—as respondents and the Court of Appeals all concede, it is the "dilution of [petitioners'] efforts on Senator Kennedy's

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[4] The Carter-Mondale Committee (Opp. at 5) seeks to add a new test to rights assertable in federal court—namely, that the injury to those rights be "quantifiable." But neither the cases cited nor any other case to our knowledge makes any such requirement. *See* to the contrary United States v. SCRAP, 412 U.S. 669 (1973). Substantial injury is the requirement, and that has certainly been alleged.

[5] Fed. Respondents' Opp. at 4-6; Carter-Mondale Opp. at 6-8.

behalf."[6] Indeed the complaint shows just what the federal respondents would concede as establishing standing—"appreciable impact on petitioners' *efforts* on behalf of Senator Kennedy,"[7] *see* p. 2, *supra*.

3. Respondents echo the Court of Appeals' asserted fear that it would not be "prudent" to order an end to this masisve abuse of patronage.[8] They try to distinguish *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, —— U.S. —— (1980), and *Illinois State Employees Union* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1973), as involving narrower matters. But the patronage abuses this Court considered in those cases included not only one of the very specific practices alleged here, threat of job loss for political reasons, but the broad range of "public benefits" whose "selective award" incumbents use to keep themselves in office, *Illinois State Employees Union*, 473 F.2d at 576—such benefits as "government contracts" or "improved public services," *Elrod*, 427 U.S. at 353. If, as this Court declared in *Branti*, —— U.S. at —— n. 12, the "distribution of [such] other public benefits, must be justified by a governmental purpose," it cannot be "imprudent" for a court to demand that such benefits not be distributed for the purpose of securing the incumbent's perpetuation in office.

4. Finally respondents seek to deny the continued validity and vitality of the holding granting standing in *Shakman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970),[9] applied again only last year, 481 F. Supp. 1315 (N.D. Ill. 1979), which they

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[6] *Id.*; Carter-Mondale Opp. at 7.

[7] Fed. Respondents' Opp. at 4 (emphasis added).

[8] Fed. Respondents' Opp. at 6; Carter-Mondale Opp. at 8-9.

[9] Fed. Respondents' Opp. at 7; Carter-Mondale Opp. at 10.

cannot deny is squarely in conflict with the decision below. They rely on *Mulqueeny* v. *National Commission on the Observance of International Women's Year*, 549 F.2d 1115 (7th Cir. 1977). In a bald attempt to mislead the Court respondents ignore that *Mulqueeny*—unlike *Shakman* and unlike this case—of course did not involve the vote, and more important, alleged only a claim by implication from a federal statute—not the vital First Amendment and Equal Protection rights recognized in *Shakman* and tossed aside by the lower courts here. So, for obvious reasons—as respondents also ignore—*Mulqueeny* never even mentioned, much less overruled, *Shakman* in the Seventh Circuit.

5. Only this Court stands between respondents and the destruction of precious irreplaceable political rights. This case does not involve Senator Kennedy's victory or defeat. It involves the rights of these petitioners to advance their political beliefs free of the overwhelming weight on the opposite side—the incumbent's side—of lawlessly applied federal money and federal power.

Respectfully submitted,

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